NABORS DRILLING (LABUAN) CORPORATION v. LEMBAGA PERKHIDMATAN KEWANGAN LABUAN

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
STEPHEN CHUNG JCA
[CIVIL APPEAL NO: S-01(IM)(NCVC)-420-11-2017]
24 FEBRUARY 2020

ADMINISTRATIVE LAW: *Judicial review – Application to quash decision – Labuan Financial Services Authority – Power to issue Guidelines on Establishment & Operations of Labuan Leasing Business – Requirement for payment of fee and to obtain approval for every subsequent leasing transaction – Whether item 8.2 of Guidelines ultra vires s. 7(6) of Labuan Companies Act 1990 ('LCA') – Whether Labuan Financial Services and Securities Act 2010 prevails over LCA*

The appellant was a leasing company registered under the Labuan Companies Act 1990 ('LCA'), making it a 'Labuan company' that came within the supervisory and regulatory reach of the respondent ('Labuan FSA'), set up under the Labuan Financial Services Authority Act 1996 ('LFSAA'). The respondent is the central regulatory, supervisory and enforcement authority of the international business and financial services industry in Labuan. The appellant had applied for approval of the leasing transaction with a Malaysian resident in respect of the lease of an oil rig ('Rig 488') and paid the requisite fee of RM60,000 as prescribed under the Labuan Financial Services and Securities Regulation 2010 ('LFSSR'). The appellant entered into a subsequent leasing transaction with a Malaysian resident in respect of Rig 503 without the approval of the respondent and without paying any leasing fee under the LFSSR. The application for approval, made 20 months later, was rejected by the respondent and the appellant was informed that the subsequent leasing transaction 'should not be deemed as Labuan business activity and any income derived from the transaction should not be taxed under the Labuan Business Activity Tax Act 1990 ('LBATA')'. The respondent subsequently issued a show cause notice to the appellant and ordered the appellant to pay an administrative penalty of RM10,000. The respondent also rejected the appellant's requests for approval. In a letter dated 9 April 2015 the respondent finally granted approval for the subsequent leasing transaction and stated that the approval had no retrospective effect and was to be effective only from the date of the letter. The appellant accepted the approval and paid the fee of RM20,000 as instructed by the respondent. The appellant filed a judicial review application, at the High Court, to quash the decision contained in the letter dated 9 April 2015, *ie*, that the approval had no retrospective effect. The

A appellant also applied for a declaration that the Guidelines on the Establishment & Operations of Labuan Leasing Business ('Guidelines') was null and void. The High Court dismissed the application and hence, this appeal. The issue raised was whether, for subsequent leasing transactions with Malaysian residents, the appellant was required to obtain the B respondent's prior approval in addition to paying subsequent leasing transaction fees. The appellant's case was that item 8.2 of the Guidelines is *ultra vires* s. 7(6) of the LCA because it requires the prior approval of the respondent for a subsequent leasing transaction.

Held (dismissing appeal)

C **Per Abdul Rahman Sebli JCA delivering the judgment of the court:**

(1) The respondent, being the central regulatory, supervisory and enforcement authority of the Labuan international business and financial centre, has the power to issue the Guidelines pursuant to s. 4A of the LFSAA. There was nothing *ultra vires* or unlawful about the requirement D for payment of fee and to obtain the respondent's approval for every subsequent leasing transaction. Item 8.2 of the Guidelines is *intra vires* the respondent's powers and functions and is not inconsistent with the provisions of the LCA, the LFSAA and the LFSSR. In fact, the LFSSR makes it clear that approval for all Labuan leasing transactions is E required, be it first leasing transactions or subsequent leasing transactions, or with residents or non-residents. However, a fee is only payable for leasing transactions involving Malaysian residents. (paras 17 & 18)

(2) The authority to collect fees for a subsequent leasing transaction with a F resident is already provided for in the Third Schedule of the LFSSR. Section 7(6) of the LCA merely provides generally that for any licensed activity, notification is not required in respect of transactions with a Malaysian resident. In any event, the Labuan Financial Services and Securities Act 2010 being a specific legislation which 'provide for the G licensing and regulation of financial and securities in Labuan', prevails over the LCA with regard to Labuan licensed activities, which included leasing business as carried out by the respondent. The trial judge was therefore right in holding that item. 8.2 of the Guidelines does not contradict s. 7(6) of the LCA. (paras 19 & 20)

H **Case(s) referred to:**

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

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Legislation referred to:
Labuan Companies Act 1990, s. 7(6)
Labuan Financial Services Authority Act 1996, ss. 3(2), 4, 4A, Schedule
Labuan Financial Services and Securities Act 2010, ss. 36, 92
Labuan Financial Services and Securities Regulations 2010, Third Schedule

For the appellant - Mohd Arief Emran Arifin, Jason Liang Dinghui & Kellie Allison Yap; M/s Wong & Partners
For the respondent - William Lim Wee Chong, Nur Izzati Rosli & Sylvia Tan Sze; M/s Ariff Rozhan & Co

[Editor's note: For the High Court judgment, please see Nabors Drilling (Labuan) Corporation v. Lembaga Perkhidmatan Kewangan Labuan [2019] 1 CLJ 277 (affirmed).]

Reported by S Barathi

JUDGMENT

Abdul Rahman Sebli JCA:

[1] This appeal arose from the appellant's judicial review application which was dismissed by the High Court on 10 October 2016. Having heard arguments by both sides, we dismissed the appeal by a unanimous decision. These briefly are our grounds for affirming the decision of the High Court.

[2] At the commencement of the hearing, learned counsel for the appellant informed us that he was abandoning the rest of the issues he raised in his written submissions except the following issue:

> (c) a declaration that Item 8.2 of the Guidelines on the Establishment & Operations of Labuan Leasing Business runs contrary to section 7(6) of the Labuan Companies Act, 1990, and is therefore *ultra vires*, unlawful, null and void;

[3] It was a pure question of law. Item 8.2 of the Establishment and Operations of Labuan Leasing Business ("the Guidelines") stipulates as follows:

> 8.2 Subsequent leasing transactions with Malaysian residents are subject to Labuan FSA's prior approval and payment of subsequent transaction fee.

[4] Section 7(6) of the Labuan Companies Act 1990 ("the LCA") on the other hand provides as follows:

> 7(6) Notwithstanding subsection (5), a Labuan company is not required to notify the Authority of transactions between the Labuan company and the resident where:
>
> (a) the Labuan company carries on any licensed activity with a resident under the Labuan Financial Services and Securities Act 2010;

(b) the Labuan company makes or maintains deposits with a person carrying on a business within Malaysia;

(c) the Labuan company makes or maintains a professional contact with any counsel, attorney, accountant, book-keeper, Labuan trust company or a corporation wholly owned by a Labuan trust company made available by the Labuan trust company to act or to be appointed as a resident director or a resident secretary of a Labuan company, management company, investment adviser or other similar person carrying on business within Malaysia;

(d) the Labuan company prepares or maintains books and records within Malaysia;

(e) the Labuan company holds, within Malaysia, meetings of its directors or members;

(f) the Labuan company acquires or holds any lease of any property for the purposes of its operation or as accommodation for its officers or employees;

(g) the Labuan company holds shares, debt obligations or other securities in a company incorporated under this Act or in a domestic company, or holds shares, debt obligations or other securities including shares and any property provided as collateral to secure any borrowing for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money; or

(h) a resident in Malaysia holds shares in that Labuan company.

[5] The issue was whether, for subsequent leasing transactions with Malaysian residents, the appellant was required to obtain the respondent's prior approval in addition to paying subsequent leasing transaction fees. The appellant's case was that item 8.2 of the Guidelines is *ultra vires* s. 7(6) of the LCA because it requires the prior approval of the respondent for a subsequent leasing transaction when no such requirement is imposed by s. 7(6) of the LCA. It was argued that if there is no legal requirement to even notify the authorities, it stands to reason that there would not be any requirement for the prior approval of the respondent which item 8.2 of the Guidelines imposes.

[6] The facts as set out by the learned High Court Judge in his grounds of judgment are not in dispute and they are as follows, with the necessary modifications. The appellant is a leasing company registered under the LCA, thus making it a "Labuan company". The respondent (known by its acronym "Labuan FSA") was set up under the Labuan Financial Services Authority Act 1996 ("the LFSAA"). Section 3(2) of the LFSAA enacts that the respondent is the central regulatory, supervisory and enforcement authority

of the international business and financial services industry in Labuan. Section 4 of the LFSAA gives further powers to the respondent. It provides that the respondent may administer and enforce not only the provisions of the LFSAA but also other laws listed in the Schedule, namely:

(i) the LCA;

(ii) the Labuan Business Activity Tax Act, 1990 ("the LBATA");

(iii) the Labuan Trusts Act 1996;

(iv) the Labuan Foundations Act 2010;

(v) the Labuan Islamic Financial Services and Securities Act 2010;

(vi) the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010; and

[7] Being a Labuan company, the appellant comes within the supervisory and regulatory reach of the respondent. Furthermore, it had been granted a license by the respondent under s. 92 of the Labuan Financial Services and Securities Act 2010 ("LFSSA 2010") to carry on leasing business.

[8] The decision of the respondent that aggrieved the appellant was in connection with the lease of an oil rig. The respondent had initially granted approval to the applicant to lease an oil rig known as Rig 488 to a Malaysian resident on 13 July 2011. The letter of approval stated that the approval was subject to the condition that the applicant "complies with the relevant Acts, legislations and guidelines issued by Labuan FSA at all times."

[9] The Labuan Financial Services and Securities Regulation 2010 ("the LFSSR") prescribes a fee of RM60,000 for approval of a single leasing transaction with a Malaysian resident. However, no fee is required for approval of a leasing transaction with a non-resident under the LFSSR. The appellant had applied for approval of the leasing transaction with a Malaysian resident in respect of Rig 488 and paid the requisite fee. Thus, there was no issue in respect of Rig 488.

[10] However, the appellant entered into a subsequent leasing transaction with a Malaysian resident in respect of Rig 503 without the approval of the respondent and without paying any leasing fee under the LFSSR. The appellant belatedly applied for approval *vide* letter dated 28 October 2013, some 20 months later.

[11] The respondent rejected the application on 6 May 2014 and informed the appellant that the subsequent leasing transaction "should not be deemed as Labuan business activity and any income derived from the transaction should not be taxed under the LBATA". Under the LBATA, the appellant could avail itself of tax benefits if a particular leasing transaction is deemed a "Labuan business activity."

[12] On 7 May 2014, the respondent issued a show cause notice to the appellant. As the explanation of the appellant did not commend itself to the respondent, the appellant was ordered to pay an administrative penalty of RM10,000 *vide* letter dated 27 June 2014. However, on 23 September 2014, the appellant through its agent (Deloitte) requested the respondent to "reconsider granting the approval" for the subsequent leasing transaction. This request was rejected by the respondent on 16 December 2014.

[13] On 26 February 2015, the appellant again asked for approval for the subsequent transaction. In the letter dated 9 April 2015, the respondent finally granted approval for the subsequent leasing transaction. However, the respondent made it clear in the letter that the approval had no retrospective effect and was to be effective only from the date of the letter. The appellant was also asked to pay a fee of RM20,000 if it wished to accept the approval. The appellant accepted the approval and paid the fee of RM20,000.

[14] The relief that the appellant sought for in the High Court was to quash the decision contained in the letter dated 9 April 2015, ie, that the approval had no retrospective effect. At the same time, it applied for a declaration that the Guidelines is null and void. The appellant claimed that the approval with no retrospective effect was unreasonable, unlawful and void. The reason why the appellant wanted the approval to have retrospective effect was so that the subsequent leasing transaction complied with the guidelines. In other words, the object was to validate the subsequent leasing transaction by way of backdating the approval.

[15] It was the appellant's contention that the guidelines runs contrary to s. 7(6) of the LCA on the following grounds. The leasing business undertaken by the appellant is undertaken under the LFSAA which is defined under s. 86 of the LFSSA 2010. This, according to the appellant, is to be contrasted with the previous legislation which provides that any licensed Labuan company that intends to enter into any transaction with a resident would have to obtain an express approval or consent from the respondent.

[16] It was argued that since the requirement of consent for any transaction with a resident has been removed by the LCA and that under the LCA even a notification is not required, the respondent was not entitled to add any new

requirement that will contradict the main legislation. It was argued that the Guidelines was meant to clarify the provisions of the Labuan legislations to facilitate compliance, and not to usurp the powers of Parliament, citing *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 in support.

[17] We found no merit in the argument. First of all, the respondent, being the central regulatory, supervisory and enforcement authority of the Labuan International Business and Financial Centre, has the power to issue the guidelines pursuant to s. 4A of the LFSAA. We agree with learned counsel for the respondent that there is nothing *ultra vires* or unlawful about the requirement for payment of fee and to obtain the respondent's approval for every subsequent leasing transaction. In fact, the respondent itself in its affidavit (2) admitted that "… the payment of the RM20,000 is correct in law, as subsequent leasing require payment to the respondent …".

[18] It is clear to us that item 8.2 of the Guidelines, which stipulates that "subsequent leasing transactions with Malaysian residents are subject to Labuan FSA's prior approval and payment of subsequent transaction fee", is *intra vires* the respondent's powers and functions and is not inconsistent with the provisions of the LCA, the LFSAA and the LFSSR. In fact, the LFSSR makes it clear that approval for all Labuan leasing transactions is required, be it first leasing transactions or subsequent leasing transactions, or with residents or non-residents. However, a fee is only payable for leasing transactions involving Malaysian residents.

[19] Further, the authority to collect fees for a subsequent leasing transaction with a resident is already provided for in the Third Schedule of the LFSSR. Section 7(6) of the LCA merely provides generally that for any licensed activity, notification is not required in respect of transactions with a Malaysian resident. It is stretching the argument to suggest that since not even a notification is required by s. 7(6) of the LCA, it follows that no approval is required for any subsequent leasing transaction, notwithstanding item 8.2 of the Guidelines.

[20] In any event, the LFSSA being a specific legislation which "provide for the licensing and regulation of financial and securities in Labuan", it prevails over the LCA with regard to Labuan licensed activities, which includes leasing business as carried out by the respondent. The maxim *generalia specialibus non derogant* applies. The learned judge was therefore right in holding that item 8.2 of the Guidelines does not contradict s. 7(6) of the LCA.

[21] It was for these reasons that we dismissed the appellant's appeal and affirmed the decision of the High Court.